

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Oakland, California)

BAY AREA URBAN LEAGUE, INC.
Employer

and

Case 32-RC-4883

OAKLAND AMERICAN
FEDERATION OF TEACHERS,
LOCAL 771, AFL-CIO, CFT/AFT
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the "Board."

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. For reasons set forth more fully, *infra*, the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner seeks to represent a unit, herein called the “Unit,” consisting of all full-time and part-time non management employees employed by the Employer at the Oakland Street Academy campus,¹ excluding management and confidential employees as defined in the Act. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

THE FACTS

The Employer is an organization located in Oakland, California that seeks to provide self-sufficiency and economic empowerment for African Americans and other persons of color through economic and community development, social services and educational services. In furtherance of its goals, the Employer operates the Richmond Main Street Initiative, which seeks to create and implement urban planning in the city of Richmond, California; the Cal Works program which provides career training and guidance for the unemployed; and a Community Building initiative, through which individuals who live in Oakland Housing Authority Facilities are taught parenting skills. Finally, the Employer also operates an alternative high school called the Emiliano Zapata Street Academy (herein called the “Academy”), the site of work for the employees that Petitioner seeks to represent.

¹ The evidence shows that the correct name of the academy operated by the Employer is the Emiliano Zapata Street Academy, not the Oakland Street Academy.

Stanley Hall is the President and CEO of the Employer and has served in these capacities for two years. He is responsible for day to day administration and management of the Employer. The Employer's main office is located at 303 Hegenberger Road, Suite A in Oakland, California. Hall and a staff of six, work at the Hegenberger Road office. The other staff members working at the Hegenberger Road office are the fiscal officer, the economic development project manager, the economic development coordinator, the office manager, the executive assistant to the president and a social service worker.

The Employer pays annual dues in the amount of \$10,000 to the National Urban League, which is located in New York. In return for paying these dues, the National Urban League, provides occasional training for unspecified members of the Employer's staff; provides the Employer with copies of the National Urban League's monthly magazine, "Opportunities;" and permits the Employer to use the title "Urban League."

In his capacity as the CEO of the Employer, within the past year Hall traveled to business meetings in the states of Colorado, New York and Texas. Each trip lasted from three to four days. On each occasion Hall traveled to his destination via airplane and stayed at a hotel, all of which was paid for by the Employer.

The Employer has an agreement with the Oakland Unified School District, herein called "OUSD", under which the OUSD disperses a certain amount of funds to the Employer for each student that attends the Academy during the school year. During the twelve months immediately preceding the

representational hearing, the OUSD distributed approximately \$570,000 to the Employer for the operation of the Academy. The OUSD owns the facility in which the Academy is operated and does not charge the Employer rent for its use. The Academy is connected to the OUSD computer network, and the OUSD maintains the computer network and assists with computer troubleshooting addressing those matters that administrative assistant David Stephens cannot resolve. Furthermore, the OUSD provides about ninety percent of the Academy's textbooks and provides janitorial services for the Academy, all without charge to the Employer.

In addition to the funds and services received from the OUSD during the twelve months immediately preceding the representational hearing, the Employer also received gross revenue of about \$600,000 from various sources including the County of Alameda, the Oakland Housing Authority, the City of Richmond, grants from corporations and other charitable contributions. The Employer also generates charitable donations through a number of fund raising events it sponsors throughout the San Francisco Bay Area.

The Academy is a four-year college preparatory high school that has been in operation for twenty-eight years.² Among the core subjects taught at the Academy are Math, Science, Social Studies, Government, and English. The Academy issues to graduating students a diploma endorsed by the OUSD. This past year, the Academy had about 130 students. The students come from throughout the Bay Area to attend the Academy: often students first contact with the Academy is through referrals from school administrators or the Court system,

others apply to the school on their own initiative. Prospective students are interviewed by panels consisting of one teacher and two students. This panel in turn makes recommendations as to the viability of candidates for admission to Myrick, who is also involved in the admissions decision making process.

The Employer employs eleven employees at the Academy: Principal/Administrator, Patricia Williams Myrick, eight teachers, and two administrative assistants, David Stephens and Bobby Young. Myrick has been the principal/administrator of the Academy for 24 years. Myrick is the on-site administrator and oversees all of the teachers and administrative assistants in the performance of their job duties. As such, she is responsible for the payroll and approves employees' requests for leave from work.³

The teachers are responsible for teaching their respective courses. The Academy requires its teachers to hold State teaching credentials, or to have passed the CBEST (a basic English math and writing test) and to be enrolled in a program to obtain a credential. Although there is evidence that all of the teachers do have their credential or have passed CBEST and are working toward securing their teaching credential, it is unclear how many actually has their credential.⁴ The record is silent on the requirements for obtaining a secondary credential. However, I take administrative notice that California Education Code § 44256 Authorization for Teaching Credentials (a), provides that "a special

² The Academy is located at 417 29th Street in Oakland, California.

³ Both parties submit that Myrick should be excluded from the unit because she is a statutory supervisor. As noted above, the evidence supports the party's positions. Accordingly, I find that Myrick is a statutory supervisor.

⁴ The evidence does show that Academy biology teacher Betty Schultz holds a California secondary credential, with a specialization in Biological Sciences.

secondary teaching credential means a special secondary teaching credential issued on the basis of at least a baccalaureate degree, a student teaching requirement, and 24 semester units of coursework in the subject specialty of the credential.”

Administrative assistant David Stephens is responsible for compiling and maintaining student records, including grade transcripts and attendance records, and he also serves as a troubleshooter for computer difficulties. He interacts with the various teachers on a daily basis in the execution of these duties.

During the past year, Stephens did not have any teaching responsibilities. However, in prior years he taught a course about the Internet. This course, which met once a week, introduced students to the history and function of the Internet, and helped them build their skills in Internet search methods. Stephens did not teach the Internet class this past school year because he was working on a grant. Stephens does not serve as a substitute teacher. He was not educated as a teacher or trained to be a teacher, and he does not have, and is not working toward obtaining a secondary teaching credential.

Administrative assistant Young performs data entry and also has some teaching responsibilities. According to CEO Hall, Young served as a substitute teacher during the past school year for no more than five school days and, in prior school years, Young also taught a special elective course designed to instruct students about riding and grooming horses. That course met once a week. The Employer plans to reinstate this elective during the next school year and expects that the course will meet once a week.

Administrative assistant Stephens testified that Young spends about ninety percent of his time teaching. He further testified that during the past school year, Young taught an elective course called Native Arts, which deals with Native American arts and crafts. This course met twice a week. Young has been teaching this Native Arts class on and off for three to four years. Young has served as a long-term substitute teacher of Physical Science within the last few years.⁵ Also, Young taught a math class for over a month during the past school year, that class met four times a week. Additionally, in past years, Young has also served as a substitute teacher, such as in English and Science.

Biology teacher Schultz testified that Young has taught several electives in the past, such as horses on the hill, native arts, native history, and that he has also served as a substitute teacher on an on call basis and served as a long term substitute for unfilled positions. He served as a long-term substitute for the Physical Science course several years ago and during the past school year, he served as a long-term substitute in math courses for two separate extended periods of time. She estimated that during the past school year, Young spent more than fifty percent but less than ninety percent of his time teaching.

I note that Hall works in the Employer's office on Hegenberger Road, which is in a separate location from the Academy. While Hall testified that he on occasion visits the Academy, there is no evidence that his visits are of a nature as to apprise him of how often or not Young is teaching courses. Schultz and Stephens have worked in the Academy with Young on a daily basis and,

⁵ Physical Science as taught at the Academy is the study of motion forces, a less sophisticated version of physics.

especially in view of the small size of the staff, are in a far better position to assess the extent of Young's teaching activities. Accordingly, I find that Young has spent a significant amount of his working time teaching courses and is expected to continue to do so for the indefinite future.⁶

The teachers and the administrative assistants are salaried employees. The teachers and the administrative assistants have the same assigned holidays, tax shelter annuity, receive the same medical benefits and are subject to the same policy regarding leave from work. Both classifications have access to the same Academy facilities, such as the restrooms and lunch area.

The teachers are scheduled to work from 8:00 a.m. to 3:00 p.m. daily. The administrative assistants have scheduled hours from 8:00 a.m. to 4:00 p.m. daily. Both classifications get a break for lunch. With the exception of last summer, in which Hall made a special allowance for the principal and an administrative assistant to work on a special project, neither teachers nor administrative assistants perform Academy work while school is out of session during the summer.

THE ANALYSIS

Jurisdiction

The Employer argues that the Academy does not meet the Board's statutory jurisdictional standard for secondary schools, which is \$1,000,000 in gross revenue within an applicable 12-month period. The Employer notes that

⁶ The Academy also uses substitute teachers on occasion to fill a vacancy. These substitute teachers work on an irregular basis, typically work for other employers as well, and are required to hold State teaching credentials. Neither party contends that these

the budget for the Academy was about \$570,000 for the past school year, and thus the Employer concludes that the Board's \$1,000,000 jurisdiction standard is not satisfied.

The Employer is correct that the applicable Board jurisdictional standard for employers operating secondary schools is \$1,000,000 in gross revenue during an applicable 12-month period. See *Shattuck School*, 189 NLRB 886 (1971); *German School of Washington D.C.*, 260 NLRB 1250 (1982). However, the Employer incorrectly limited its calculation of gross revenues to the amount budgeted for the Academy. The Academy is a part of, and is directly operated by, the Bay Area Urban League. There is no evidence showing that the Academy is a separate legal entity and neither party contends as much. Pursuant to Board law, all of an employer's gross income is aggregated in determining whether the Employer meets a Board jurisdictional standard. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB No. 154 (2000); see also, *Nagio Restaurant*, 289 NLRB 22, 25 (1988). Accordingly, as in *Senior Citizens Coordinating Council*, here I considered the aggregate income derived from all of the Employer's operations in analyzing whether the Board's jurisdictional standard has been established. During the past year, in addition to the approximately \$570,000 that the Employer received for operating the Academy, the Employer also received approximately \$600,000 from various other sources. Thus, during the past year, the Employer had gross revenue in excess of \$1,000,000.

substitute teachers should be included in the bargaining unit, and I find that they are not included in the Unit.

I also note that the Employer pays \$10,000 in annual dues to the National Urban League (located in the state of New York) for the right to use the title “Urban League,” for copies of the National Urban League’s monthly magazine and for certain training. Further, within the past year, the Employer has paid airline fares and hotel fees in connection with trips that President and CEO Hall has made to destinations outside the state of California. Accordingly, I find that the Employer does meet the Board’s jurisdictional standards for private high schools.

The Employer also contends that I should not assert jurisdiction herein because each of its programs is purely local in nature and does not have the requisite impact on interstate commerce. However, the Board has consistently asserted jurisdiction over employers who operate elementary and/or high schools and has specifically observed that the operation of such schools has a substantial impact on interstate commerce. See *Soy City Bus Services*, 249 NLRB 1169, 1170 fn. 3 (1980); *Henry M. Hald High School Association*, 213 NLRB 415 (1974); *The Judson School*, 209 NLRB 677 (1974); *Mitchell School*, 224 NLRB 1017 (1976). Accordingly, I find that the Employer’s operation of the Academy has a substantial impact on interstate commerce.⁷

The Teachers’ Professional Employee Status

Neither party contends that the Academy’s teachers are professional employees. However, where the Board has sufficient information to put it on

⁷ Moreover, the Employer’s other operations, which involve rendering social services, urban planning and economic development constitute an alternative basis for my finding that there is a substantial impact on interstate commerce. The Board routinely asserts

notice that there is an issue with respect to the professional status of employees it must conduct further inquiry and cannot rely on the fact that the parties do not raise the issue. See *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999).

Section 2(12)(a) contains the Act's definition of a professional employee and provides in pertinent part that the term means:

any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

I find that elements (i) and (ii) of Section 2(12)(a) are satisfied because the Academy's teachers work in preparing for and conducting classes is predominantly intellectual and involves consistent exercise in discretion and judgment, regardless of the field of instruction. This is so because, fundamental to teaching is the task of conveying ideas in a manner that can be readily understood by students. The teaching process is further complicated because students invariably differ in temperament, knowledge and aptitude. Similarly, element (iii) is satisfied because the output of teaching, to wit, the conveying of ideas, is inherently intangible and thus not capable of being measured or standardized.

jurisdiction over employers engaged these types of operations. See *Hispanic Federation for Social and Economic Development*, 284 NLRB 500, 501 (1987).

As to element (iv) of Section 2(12)(a), I find that the Board's decision in *Catholic Bishop of Chicago* 235 NLRB 776 (1978) is applicable to this case. In *Catholic Bishop of Chicago*, the employer operated day care centers for children ages 3-4 where teachers were to promote the children's intellectual, physical and emotional growth. Before the Board was whether the teachers' work met the definition of Section 2(12)(a) (iv). The Board decided that element (iv) was satisfied because 21 of 29 teachers were hired with bachelors or master's degrees and a minimum of 12-18 semester hours of education in early childhood development. Similarly, in *The Chase House*, 235 NLRB 792 (1978), teachers in a head start program, who were required to have a bachelors degree in child education and who taught basic science, math and language skills; researched new curriculum methods; trained and instructed subordinate staff, were held to be professionals under the Act.

After carefully considering the relevant case law and the evidence, I find that the teachers' work in this case meets the standard set forth in element (iv) of Section 2(12)(a). The Employer operates a high school that provides college preparatory education, emphasizing core academic courses. The Employer requires its teachers to hold bachelor's degrees and to be or become credentialed. To secure their secondary teaching credential, the teachers must complete a minimum of 24 semester hours in the field in which they are teaching. This requirement further demonstrates the advanced academic knowledge that the Academy's teachers must have. Accordingly, I find that the Academy's teachers are professionals under Section 2(12)(a) of the Act.

Appropriate Unit

The Employer takes issue with the composition of the petitioned for unit on the grounds that the administrative assistants and teachers lack a sufficient community of interests.

Contrary to the Employer's assertions, the evidence establishes that the administrative assistants, especially Young, share a substantial community of interest with the teachers. First and foremost, the evidence shows that Young has done and continues to do a substantial amount of teaching at the Academy. Other than this past year, Stephens has also regularly taught an elective course at the Academy. The fact that the administrative assistants actually perform the work of teachers militates heavily in favor of finding that the administrative assistants have a substantial mutuality of interest with the teachers.

In addition, both the administrative assistants and the teachers are directly supervised by Myrick. They enjoy the same holiday schedule; are subject to the same policy with respect to excused leave; have the same medical benefits and tax benefits package; have equal access to the Academy's facilities; and are salaried employees. Further, with respect to Stephens, who did not teach at all during the past school year, he interacted with teachers on a daily basis, trouble shooting on computer issues, and compiling grade and attendance reports.

I am mindful that the administrative assistants are not professional employees, are not certified teachers and spend a substantial amount of time typing, filing and compiling records. In addition, the administrative assistants do not participate in the admissions or orientation process as teachers do.

However, as described above, the evidence when considered as a whole dictates a finding that there is a substantial mutuality of interests between the two classifications.⁸ Moreover, I note that the Board has previously approved of units that include teachers and non-professional employees such as administrative assistants. See, *Catholic Community Services*, 254 NLRB 763 (1981) and *Harbor Creek School for Boys*, 249 NLRB 1226 (1980).

Based upon the above findings and the record as a whole, I find the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its Emiliano Zapata Academy in Oakland, California; excluding confidential employees, guards, managerial employees and supervisors as defined by the Act.

The unit set forth above includes professional and nonprofessional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals unless a majority to the professional employees vote for inclusion in such a unit. Accordingly, to ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees, we shall direct separate elections in the following voting groups:

Voting Group (A): All full time and regular part time administrative employees employed by the Employer at its Emiliano Zapata Academy in Oakland, California; excluding

⁸ Although Stephens does not perform as much teaching as Young, based on the evidence I find that there is a significant mutuality of interest among him, Young and the teachers. Moreover, were Stephens to be excluded from the Unit, he would be the only employee at the Academy who is not included in the Unit.

all other employees, confidential employees, guards, managerial employees, and supervisors as defined by the Act.

Voting Group (B): All full-time and regular part-time teachers employed by the Employer at its Emiliano Zapata Academy in Oakland, California; excluding all other employees, confidential employees, guards, managerial employees, and supervisors as defined by the Act.

The employees in Voting Group (A), the nonprofessional voting group, will be asked on their ballots: Do you desire to be represented for purposes of collective bargaining by the Oakland American Federation of Teachers, Local 771, AFL-CIO, CFT/AFT?.

The employees in Voting Group (B), the professional employees, will be asked the following two questions on their ballots: (1) Do you desire to be included with nonprofessional employees in a unit for the purposes of collective bargaining? (2) Do you desire to be represented for purposes of collective bargaining by the Oakland American Federation of Teachers, Local 771, AFL-CIO, CFT/AFT?

If a majority of the professional employees, Voting Group (B), vote “yes” to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the vote of the nonprofessional employees to decide whether or not the Union has been selected to represent the combined bargaining unit. If, on the other hand, a majority of the professional employees, Voting Group (B), do not vote for inclusion, they will not be included with the nonprofessional employees, Voting Group (A). Then, the professional

employees' votes on the second question will be counted separately to decide whether they wish to be represented by the Union in a separate professional unit. If a majority in either the professional unit alone, the nonprofessional unit alone, or the combined unit vote for the Union, the Regional Director will issue an appropriate Certification of Representative for such unit or units.

There are approximately 2 employees in Voting Group (A) and approximately 8 employees in the Voting Group (B).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate, at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁹ Eligible to vote are those in the respective voting groups who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not

been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote in the manner described above on whether or not they desire to be represented by the Oakland American Federation Of Teachers, Local 771, AFL-CIO, CFT/AFT.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters in Voting Group A, and separately containing the full names and addresses of all eligible voters in Voting Group B, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before July 10, 2001. No extension

⁹ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 17, 2001.

Dated at Oakland California this 3rd day of July, 2001.

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

Digest Numbers:

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